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## Controlling the Arms Trade: One Important Stride for Humankind

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## ARTICLE

### CONTROLLING THE ARMS TRADE: ONE IMPORTANT STRIDE FOR HUMANKIND

*Barry Kellman\**

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## INTRODUCTION

A new treaty has emerged to address the most ubiquitous means of violence that the world has ever known. In the Arms Trade Treaty (“ATT”),<sup>1</sup> humanity has taken an important stride, treating *conventional arms*<sup>2</sup> as a central topic of global weapons control which has heretofore focused predominantly on weapons of mass destruction.<sup>3</sup> The ATT’s goal is to contribute to

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1. Final United Nations Conference on the Arms Trade Treaty, Mar. 18–28, 2013, *Draft Decision*, U.N. Doc. A/CONF.217/2013/L.3 (Apr. 2, 2013) [hereinafter ATT] (the Arms Trade Treaty’s text is annexed to the draft decision). The Arms Trade Treaty (“ATT”), while approved by the UN General Assembly, has not yet entered into force. See *Signature and Ratification*, UNITED NATIONS, [http://www.un.org/disarmament/ATT/docs/ATT\\_info\\_kit.pdf](http://www.un.org/disarmament/ATT/docs/ATT_info_kit.pdf), 3 (last visited March 21, 2014) [hereinafter *Signature & Ratification*]; *The Arms Trade Treaty*, UNITED NATIONS, <http://www.un.org/disarmament/ATT> (last visited March 21, 2014) (stating that thirteen states have currently ratified the treaty).

2. Throughout this Article, the term *conventional arms* refers to all and only the weapons included in the Arms Trade Treaty (“ATT”) scope. Article 2 identifies eight categories of conventional arms: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. ATT, *supra* note 1, art. 2. The final category, small arms and light weapons, itself comprises a broad and not-altogether-explicitly-defined group of weapons. ATT Article 3 brings within the ATT’s scope ammunition/munitions fired, launched, or delivered by conventional arms, and Article 4 applies the ATT’s provisions to parts and components that provide the capability to assemble conventional arms. *Id.* arts. 3–4. For a discussion of the ATT’s scope, see generally HILDE WALLACHER & ALEXANDER HARANG, PEACE RESEARCH INST. OSLO, SMALL, BUT LETHAL—SMALL ARMS AMMUNITION AND THE ARMS TRADE (2011), available at [http://controlarms.org/wordpress/wp-content/uploads/2011/03/Small-but-Lethal-Small-Arms-Ammunition-and-the-Arms-Trade-Treaty.PRIO\\_.pdf](http://controlarms.org/wordpress/wp-content/uploads/2011/03/Small-but-Lethal-Small-Arms-Ammunition-and-the-Arms-Trade-Treaty.PRIO_.pdf). Notably, earlier treaty text included in the list of conventional arms “Technology and Equipment specially and exclusively designed and used to develop, manufacture, or maintain.” See *Chairman’s Draft Paper*, CONTROLARMS.ORG § IV(1)(l) (July 14, 2011), <http://controlarms.org/wordpress/wp-content/uploads/2011/11/ChairPaper-14July2011.pdf>. This provision, however, did not survive to the final text.

3. To be fair, arms control has had some notable successes in controlling conventional weapons among the world’s powers and can be credited with de-escalation of violence between superpower States including the Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 1149, and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may

international peace and security by establishing high common international standards for regulating the conventional arms trade and by preventing and eradicating the illicit trade in conventional arms. Exports of arms in violation of UN Security Council arms embargoes or multilateral conventions are prohibited, and no State may transfer arms for use in the commission of grave international crimes. States must regulate arms brokering and must assess the risk that conventional arms exports will contribute to the commission of human rights violations. Moreover, the ATT encourages international cooperation and assistance to effectively implement and enforce its provisions.

Arguments should and will be made, some in this Article, about the limitations of the ATT's many provisions. Yet, the important point is that the ATT weds principles of international arms control with bedrock international legal commitments to protect human rights and diminish violence.

In the history of violence, conventional arms have taken more lives than all the nuclear, chemical, and biological weapons ("NCB weapons") combined with all the swords and spears of earlier eras. Yet in the history of international law, the control of conventional arms has been among the greatest shortcomings. Since explosive weapons (cannon and firearms) emerged in the 16th Century, bringing quantum leaps in violence,<sup>4</sup> various legal modalities for curbing violence have matured: improving conflict resolution, addressing poverty and hunger, and establishing post-conflict justice. Yet, mass violence endures. Virtually all mass violence in recent memory has entailed conventional arms, and the vast majority of the victims of conventional arms-fueled violence are civilians.<sup>5</sup>

Large quantities of conventional arms residual from the Cold War and inflated by manufacturers hungry for sales have

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be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137.

4. See Barry Kellman, *Of Guns and Grotius*, 7 J. NAT'L SECURITY L. & POL'Y (forthcoming 2014).

5. See Ramadansyah Hasan, *Controlling the Circulation of Small Arms in International Law* 3 (2013) (unpublished Ph.D. dissertation, University of Waikato), available at <http://researchcommons.waikato.ac.nz/bitstream/handle/10289/7500/thesis.pdf?sequence=3>.

sustained a flourishing market.<sup>6</sup> Unconstrained by ideology or bipolar strategic constraints and enabled by modern global delivery networks, conventional arms go wherever violence demands. Indeed, the world is awash in conventional arms, with devastating ramifications for economic and cultural development, community stability, public health, and human progress.<sup>7</sup>

On the other hand, conventional arms are also the essential tool of defense, whether national or individual. In a world where violent people have ready access to conventional weapons, peaceful people should not suffer and die simply for lack of access to comparable weapons.<sup>8</sup> Moreover, these weapons, in the hands of law enforcers, are the foundation of community security. Arguably, transfers of conventional arms can contribute to the recipient's explicitly protected right of self-defense as well as to civil stability by enabling authorized law enforcers to apprehend and prosecute criminals.

A repeated theme of this Article is that conventional arms control cannot, at least at this time, aspire to total and complete disarmament. In this sense, the challenge of conventional arms control is very different from NCB weapons control.<sup>9</sup> For the foreseeable future, many people are committed to having well-armed, legally authorized forces that are capable of inflicting

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6. See Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM L. REV. 2333, 2343 (2003); see also Hasan, *supra* note 5, at 4–6.

7. See generally Lisa Misol, Human Rights Watch, Human Rights Watch World Report 2004—Weapons and War Crimes: The Complicity of Arms Suppliers 3 (January 2004), available at <http://www.refworld.org/pdfid/402ba58b4.pdf>; Annyssa Bellal, *Arms Transfers and International Human Rights Law*, in WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW 448, 470–71 (Stuart Casey-Maslen ed., 2013); Aluko Ola, *Trans-Border Communities Planning and the Problem of Arms Smuggling in the West African Sub-Region: The Case Study of Nigeria-Benin Border Development*, 2 INT'L J. ASIAN SOC. SCI. 71, 71 (2012); C.J. Chivers, *Small Arms, Big Problems—The Fallout of the Global Gun Trade*, 90 FOREIGN AFF. 110, 117 (2011); Muhammad Munir, *The Role of Light Weapons in Creating Internal Instability: Case Study of Pakistan*, 18 J. POL. STUD. 243, 243–44 (2011).

8. See, e.g., G.A. Res. 55/255, para. 4, U.N. Doc. A/RES/55/255 (May 31, 2001) (expressing concern that a regulation on firearms could undermine a State's right to self-defense and reaffirms the right of individual or collective self-defense “which implies that States also have the right to acquire arms with which to defend themselves”); see also David B. Kopel et al., *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1275 (2006).

9. See generally Bryan Cenko, *Five Ways the Arms Trade Treaty Advances Arms Control*, FOREIGN POL'Y FOCUS (June 4, 2013), [http://fpif.org/five\\_ways\\_the\\_arms\\_trade\\_treaty\\_advances\\_arms\\_control](http://fpif.org/five_ways_the_arms_trade_treaty_advances_arms_control).

lethal force in order to preserve peace. For some people, conventional weapons should be accessible to those who would resist legally authorized forces of oppression.<sup>10</sup> In any event, conventional arms disarmament is not a viable policy objective. The ATT thus treads nuanced territory that seeks to stanch the illegal trade in conventional arms while leaving space for the legal trade in conventional arms to operate.<sup>11</sup>

The success of the ATT, which as of this writing has not yet entered into force, remains to be measured. Key determinants of that success are more in the domain of politics than law.<sup>12</sup> How quickly it enters into force, how active is its Conference of States Parties, and how effectively can its Secretariat enable national implementation that can actually stanch the flow of conventional arms—these are key questions that await answers from world leaders.<sup>13</sup> Ultimately, the ATT's policy success will be

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10. The 2006 review conference for the UN Programme of Action ("UNPoA"), discussed *infra*, is noted by experts as a historical marker for international arguments concerning the right to bear arms, of just war concepts, and of moral obligations to help people overthrow repression. See, e.g., Hasan, *supra* note 5, at 193.

11. See Donald Mahley, U.S. Representative to the Arms Trade Treaty Conference, U.S. Dep't of State, Opening Statement at the UN Conference on the Arms Trade Treaty (July 12, 2012), available at <http://www.state.gov/t/isn/rls/rm/194955.htm> ("Lawfully conducted international transfers of arms managed according to transparent national control practices are vital to maintaining good governance, protecting citizens, and upholding international security consistent with the United Nations Charter.").

12. Final Conference President, Peter Woolcott, reiterated that "[t]he final text was a compromise. It represented the broadest possible input and would make a difference to the broadest range of stakeholders, notably by setting up a forum—the conference of States parties—for transparency and accountability." Press Release, General Assembly, Overwhelming Majority of States in General Assembly Say 'Yes' to Arms Trade Treaty to Stave off Irresponsible Transfers that Perpetuate Conflict, Human Suffering, UN Press Release GA/11354 (Apr. 2, 2013), <http://www.un.org/News/Press/docs/2013/ga11354.doc.htm>.

13. It is worth noting that the United States has long been a global leader in efforts to mitigate the illicit trafficking and destabilizing accumulation of small arms and light weapons ("SALW") through diplomacy and foreign assistance. See generally Rachel Stohl, U.S. Policy and the Arms Trade Treaty 20–22 (Chatham House—Project Ploughshares, Working Paper No. 10-1, 2010), available at <http://ploughshares.ca/wp-content/uploads/2012/08/WP10.1.pdf> (noting that the United States is a State Party of the Convention on Certain Conventional Weapons (1981) and CCW Protocols I–V; has participated in the UN Register every year since its inception (1992); actively implements the UN Programme of Action on Small Arms and Light Weapons; complies with and assists others' compliance as to the UN International Tracing Instrument; is a participating State in the Wassenaar Arrangement Best Practice Guidelines on SALW and on MANPADS; is a signatory of the Inter-American

measured by how much it enables more resources and attention to be focused on helping law enforcers reduce the flow and thus the use of illicit conventional arms. From this writer's perspective, the political desirability of the ATT's ratification by humanity's leading powers seems obvious but is beyond the scope of this Article.

Compounding the difficulties of predicting the ATT's success is the ambiguity of its legal bindingness, especially as to States that do not ratify. The ATT was endorsed by a super-majority (154) of United Nations General Assembly ("UNGA") member States after efforts to reach agreement by consensus failed. It will take more than a few law review articles to work through precisely which ATT provisions apply to States Parties, to States that voted for it but have not ratified it, and to States that voted against it. An appreciation of the ATT suggests that some of its provisions are taking on a *jus cogens* aspect in the sense that no derogation is allowed even by States that do not become States Parties. Other provisions reinforce legal obligations, many preceding the ATT, and thereby strengthen the execution of international law for stanching the illicit conventional arms trade.<sup>14</sup> This Article sidesteps these unresolved questions of the ATT's ambiguous legal status, opting to better enable an understanding of what the ATT propounds, assuming its effective implementation at both national and international levels. Accordingly, in this Article's discussion of ATT requirements, guidance, and prohibitions, the unspecific noun *States* is used.<sup>15</sup>

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Convention on Transparency in Conventional Weapons Acquisitions; is a signatory of CIFTA; participates in the Organization of American States Model Regulations for the Control of Firearms; participates in the Organization for Security and Co-operation in Europe Document on Small Arms; and participates in the OSCE Principles Governing Conventional Arms Transfers). The United States is a State Party to the Convention on Transnational Organized Crime and its protocols. See G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

14. It is the position of UN Office of Disarmament Affairs that the ATT is binding only on ratifying States Parties. See *Signature & Ratification*, *supra* note 1.

15. One example of the quandary of the ATT's application to non-party States arose when negotiators removed a provision that would have required States to make feasible efforts to stop transfers of arms that are "adversely impacting the development of the importing State." United Nations Conference on the Arms Trade Treaty, July 2–22, 2012, *Draft of the Arms Trade Treaty Submitted by the President of the Conference*, art. 4(6), U.N. Doc. A/CONF.217/CRP.1 (Aug. 1, 2012) [hereinafter *Draft of the Arms Trade*

After briefly describing the ATT's negotiating history and adoption (Part I), this Article highlights three sets of substantive contributions the ATT makes to international weapons control law in the domain of conventional arms. Part II discusses the ATT's prohibitions against supplying conventional arms that contribute to the commission of violent international crimes. Part III discusses the ATT's requirements for implementation of measures to curtail illicit diversions of conventional arms. Part IV discusses the ATT's obligations on States to regulate aspects of the conventional arms market, including establishment of a national control system, regulating brokers, and regulating conventional arms imports. Altogether, this Article advocates appreciation of the ATT as a contribution to advancing the international law of controlling weaponized violence.

#### I. NEGOTIATION AND ADOPTION OF THE ATT

The ATT is the culmination of a decade-and-a-half's efforts to control conventional arms dating back at least to 1997 when Oscar Arias put forth for global consideration the idea of establishing ethical standards for the arms trade.<sup>16</sup> Two important developments, discussed more fully below, occurred in 2001. First, the UNGA adopted the Firearms Protocol ("FP") to complement the United Nations Convention against Transnational Organized Crime, propounding measures to control small arms, ammunition, parts, and components.<sup>17</sup> The FP was the first international legal instrument to criminalize firearms trafficking and to propound that States should enact laws to that end.<sup>18</sup> However, as the FP focuses on combating organized crime, it does not apply to government sales.

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*Treaty*]. Critics argued that this provision might apply to transfers to non-state parties and thereby would discourage States from signing and ratifying the Treaty.

16. Six years later, Arias brought to the United Nations a group of Nobel Peace Prize Laureates to promote the concept of a multilateral ATT. *See generally* DENISE GARCIA, *DISARMAMENT, DIPLOMACY AND HUMAN SECURITY: REGIMES, NORMS AND MORAL PROGRESS* (2011).

17. *See* Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208 [hereinafter *Firearms Protocol*], *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

18. *Id.* art. 5.



Second, also in 2001, the UNGA propounded more control measures in the nonbinding Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (“UNPoA”).<sup>19</sup> Its purpose is to develop and implement public awareness and confidence-building programmes in conflict and post-conflict situations with regard to the consequences of illicitly traded small arms. Central to the UNPoA is that States bear primary responsibility for preventing illicit diversion of small arms.<sup>20</sup> States should enact laws to effectively control the production of small arms and their export, import, transit, or retransfer.<sup>21</sup> With regard to small arms, States should apply markings, keep accurate records, regulate brokering, and use authenticated end-user certificates.<sup>22</sup> States should take legal action against persons and entities engaged in the illicit small weapons trade. States are encouraged to submit national reports on the implementation of the UNPoA<sup>23</sup> and to support regional disarmament initiatives, particularly in post-conflict situations.<sup>24</sup> While all these recommendations are widely valued, some advocates of international conventional arms control regretted the UNPoA’s nonbinding status as a missed opportunity.<sup>25</sup>

Much has been achieved in the past decade. The UNGA adopted the International Tracing Instrument (“ITI”)<sup>26</sup> to be the basis of a worldwide standardized tracing system, without which it had been difficult to trace weapons to their source and

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19. *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. (2006), [hereinafter *Small Arms Review Conference*], available at <http://www.un.org/events/smallarms2006/pdf/PoA.pdf> (the United States was the lone vote against).

20. *Id.* prmb., para. 13.

21. *Id.* part II, para. 2.

22. *Id.* part II, paras. 6–14.

23. To assist States in submitting reports, the United Nations Office for Disarmament Affairs has prepared a template and guidelines for the report, both of which are available at <http://www.un.org/disarmament/convarms/BMS/bms3/1BMS3Pages/1ReportingTools.html>.

24. *Small Arms Review Conference*, *supra* note 19, part II, para. 30.

25. See U.N. Secretary-General, *Small Arms*, S/2008/258 (Apr. 17, 2008).

26. International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, Dec. 8, 2005 [hereinafter ITI], available at <http://www.unodc.org/documents/organized-crime/Firearms/ITI.pdf>.

thereby hold suppliers accountable.<sup>27</sup> States should require that firearms be uniquely marked with the manufacturer's name, the country of its manufacture, and its serial number.<sup>28</sup> However, opposition from the United States, Israel, Egypt, and Japan stopped it from becoming legally binding; it is implemented through the UNPoA process.<sup>29</sup> Meanwhile, Interpol has been actively addressing crime involving conventional weapons and has established the International Weapons and Explosives Tracing System ("IWETS")—an international database of illicit weapons seized by national law enforcement as well as current indexes of firearms manufactures.<sup>30</sup>

Regional initiatives dealing with the arms trade have had notable accomplishments. In Africa, four legally binding instruments seek to address the millions of small arms that fuel prolonged armed conflicts and crime.<sup>31</sup> In Europe, which is

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27. See generally David H. Pendle, *From Minnesota to Mexicali: Connecting the Dots with Trafficked Firearms*, PROSECUTOR, J. NAT'L DISTRICT ATTORNEYS ASS'N, Oct.–Dec. 2011, at 30.

28. ITI, *supra* note 26, part III, para. 8(a).

29. See SARAH PARKER, ANALYSIS OF NATIONAL REPORTS: IMPLEMENTATION OF THE UN PROGRAMME OF ACTION ON SMALL ARMS AND THE INTERNATIONAL TRACING INSTRUMENT IN 2009–10, at 71 (2011), available at <http://www.unidir.org/en/programmes/process-and-practice/analysis-of-states-views-on-an-arms-trade-treaty>.

30. Michel Wery & Ilhan Berkol, *Small Arms and Light Weapons Traceability: A Comparison of the Principal Existing International Mechanisms*, in U.N. INST. FOR DISARMAMENT RESEARCH, THE SCOPE AND IMPLICATIONS OF A TRACING MECHANISM FOR SMALL ARMS AND LIGHT WEAPONS, at 161, 188–89, U.N. Sales No. GV.E.03.0.7 (2003).

31. Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000), available at <http://2001-2009.state.gov/t/ac/csbm/rd/6691.htm>; Protocol on the Control of Firearms, Ammunition and Other Related Materials, Southern Afr. Dev. Cmty., Aug. 2001 (entered into force November 8, 2004), available at [http://www.sadc.int/files/8613/5292/8361/Protocol\\_on\\_the\\_Control\\_of\\_Firearms\\_Ammunition2001.pdf](http://www.sadc.int/files/8613/5292/8361/Protocol_on_the_Control_of_Firearms_Ammunition2001.pdf); Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, Apr 2004 (entered into force May 5, 2006), available at [http://www.recsasec.org/publications/Nairobi\\_Protocol.pdf](http://www.recsasec.org/publications/Nairobi_Protocol.pdf); Convention on Small Arms and Light Weapons, Their Ammunition and Other related Material, Econ. Cmty. of W. African States, June 14, 2006 (entered into force November 20, 2009), available at <http://www.poa-iss.org/RegionalOrganizations/ECOWAS/ECOWAS%20Convention%202006.pdf>. Of more recent note, although not yet entered into force, is the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and All Parts and Components that can be used for their Manufacture, Repair and Assembly, (adopted April 30, 2010), U.N. Doc. A/65/57-S/2010/534. See generally Denise Garcia, *Arms restraint and regional international law making: The case of the Economic Community of West African States*, 18 AFRICAN SEC. REV. 78 (2009).

more a source of supply (and hence of profit) than of demand, the Code of Conduct sets criteria linking arms transfers to the recipient nation's respect for human rights and its ability to buy weaponry.<sup>32</sup> Moreover, the Organization for Security and Co-operation in Europe ("OSCE") has adopted the Document on Small Arms and Light Weapons<sup>33</sup> to foster transparency in arms transfers so as to help combat terrorism and organized crime. In the Americas, where the flow of arms is closely linked with the drug trade and organized crime, the Organization of American States ("OAS") has adopted the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials ("CIFTA").<sup>34</sup> In Southeast Asia, which is also plagued by terrorism as well as by drug and other trafficking, the Association of Southeast Asian Nations ("ASEAN") convenes biannual Ministerial Meetings on Transnational Crime to coordinate efforts to combat arms smuggling, but there is no regional convention.<sup>35</sup>

Negotiation of an internationally binding conventional arms treaty, however, remained elusive. In December 2006, the UNGA adopted Resolution 61/89, *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, calling for establishment of a group

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32. The Council of the European Union, *Code of Conduct on Arms Exports*, Doc. No. 8675/2/98 REV2 (1998), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>.

33. Org. for Sec. & Co-operation in Eur., *Document on Small Arms and Light Weapons*, FSC Doc/1/00 (June 20, 2012), available at [www.osce.org/fsc/item\\_11\\_13550.html](http://www.osce.org/fsc/item_11_13550.html). The Organization for Security and Co-operation in Europe ("OSCE") has issued two guides dealing with small arms, the OSCE Handbook of Best Practices on Conventional Ammunition (2008), available at <http://www.osce.org/fsc/33371>, and the OSCE Handbook of Best Practices on Small Arms and Light Weapons (2003), available at <http://www.fas.org/asmp/campaigns/smallarms/OSCEhandbook.pdf>.

34. Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Jan. 1, 1997, 2029 U.N.T.S. 55, available at <http://www.oas.org/juridico/english/treaties/a-63.html>.

35. See Ass'n of S.E. Asian Nations, *ASEAN Declaration on Transnational Crime, ASEAN Documents on Combating Transnational Crime and Terrorism* 9–10 (Apr. 3, 2012), [http://www.asean.org/resources/archives?task=callelement&format=raw%20&item\\_id=5415&element=a0c6d315-bb76-42c6-9ecf-c287d406937b%20&method=download](http://www.asean.org/resources/archives?task=callelement&format=raw%20&item_id=5415&element=a0c6d315-bb76-42c6-9ecf-c287d406937b%20&method=download). The last meeting was held in 2012, from July 9–13. *Overview: ASEAN Ministerial Meeting*, ASEAN.ORG, <http://www.asean.org/communities/asean-political-security-community/category/overview-4> (last visited Mar. 23, 2014).

of government experts to examine and submit a report on “the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.”<sup>36</sup> The report prepared by the UN Institute for Disarmament Research (“UNIDIR”)<sup>37</sup> concluded that, due to the many conflicting interests of States, the entire UN membership should further consider the issues in an open and transparent manner.<sup>38</sup> In response, the UNGA created the UN Open-Ended Working Group (“OEWG”) to explore the viability, scope, and draft framework for the proposed arms trade treaty.<sup>39</sup>

Soon thereafter, the General Assembly called for the UN Conference on the Arms Trade Treaty to take place in 2012 in order to “elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms.”<sup>40</sup> In preparation for the 2012 United

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36. G.A. Res. 61/89, para. 13, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

37. Over ninety countries provided submissions for this analysis. The analysis focused on considerations based on existing obligations and commitments, as well as considerations of likely user, likely use, likely impact, and recipient country. Transfer criteria with regard to humanitarian rights were of foremost concern for interested states, with international humanitarian law and terrorism as the second and third most common concerns, respectively. SARAH PARKER, ANALYSIS OF STATES’ VIEWS ON AN ARMS TRADE TREATY 10 (2007), available at <http://www.unidir.org/en/programmes/process-and-practice/analysis-of-states-views-on-an-arms-trade-treaty>. See generally GARCIA, *supra* note 16.

38. See G.A. Res. 63/334, at 2, U.N. Doc. A/RES/63/334 (Aug. 26, 2008). The United Nations Institute for Disarmament Research (“UNIDIR”) also reported that there was skepticism from several countries that an arms trade treaty would be feasible due to its lofty goals. See Michael Spies, *Towards a Negotiating Mandate for an Arms Trade Treaty*, ACRONYM INST. FOR DISARMAMENT DIPL. (Aug. 1, 2009), <http://www.acronym.org.uk/dd/dd91/91att.htm>. The United Nations recognized that lack of a uniform international standard pertaining to the transfer of small arms and light weapons aided crime and terrorism, facilitated conflict, and displaced people; consequently undermining peace, safety, and sustainable development. G.A. Res. 63/334, *supra*, at 4.

39. G.A. Res. 63/240, at 3, U.N. Doc. A/RES/63/240 (Jan. 9, 2009) [hereinafter Sec-Gen Report]. The United States was, again, the sole dissenting vote in adopting this resolution.

40. G.A. Res. 64/48, para. 4, U.N. Doc. A/RES/64/48 (Jan. 12, 2010). The resolution passed with 153 votes, with Zimbabwe being the only nation to vote against. See *The Arms Trade Treaty: Recorded Vote in the General Assembly*, DISARMAMENT RESOLUTIONS & DECISIONS DATABASE (Dec. 2, 2009), <https://gafv-vote.un.org/UNODA/vote.nsf/d523afe92781d4d605256705006e0a5d/63e1c71f5d6e11cc852576a8007788fe?OpenDocument&ExpandSection=3>. Notably the United States, the largest

Nations Conference on the Arms Trade Treaty, four preparatory committees (“PrepComs”) were held. The first of the Chairman’s Papers, drafted in 2010, detailed the principles, goals, and objectives of the ATT and its general outline.<sup>41</sup> The second draft in 2011 marked the first attempt to write the Treaty’s main provisions.<sup>42</sup> In 2012, the third and final Chairman’s Draft Paper, presented at the UN Conference on the Arms Trade Treaty, provided States with a foundation for negotiating the actual Treaty text.<sup>43</sup>

One of the most contentious issues was whether to include technology transfers<sup>44</sup> within the list of transactions or activities covered by the treaty. Many States no longer import finished weapons but instead incorporate foreign technology into equipment that local companies assemble.<sup>45</sup> Subjecting the transfer of technology to the same standards as transfers of actual arms would prevent States with poor human rights records or who should otherwise be denied from getting

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conventional arms trader in the world, voted in favor of the resolution. This marked a drastic change in the United States’ position on the subject, as it had previously been the only country to vote against the General Assembly’s resolutions in support of a treaty. See Bill Varner, *U.S. Backs Arms Trade Treaty at UN, Abandoning Bush Opposition*, BLOOMBERG (Oct. 30, 2009, 1:46 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abkyS4.975YM>.

41. Chairman’s Draft Paper, REACHINGCRITICALWILL.ORG (July 22, 2010), <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/prepcom1/docs/ChairDraftPaper.pdf> [hereinafter Chairman’s Draft Paper 2010].

42. Chairman’s Draft Paper, REACHINGCRITICALWILL.ORG (July 14, 2011), <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/prepcom3/docs/ChairPaper-14July2011.pdf> [hereinafter Chairman’s Draft Paper 2011].

43. Discussion Paper, REACHINGCRITICALWILL.ORG (July 3, 2012), <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/documents/ChairPaper-3July2012.pdf>; *Draft of the Arms Trade Treaty*, *supra* note 15. See generally *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASS’N (July 2013), [http://www.armscontrol.org/factsheets/arms\\_trade\\_treaty](http://www.armscontrol.org/factsheets/arms_trade_treaty).

44. Chairman’s Draft Paper 2011, *supra* note 42, art. 4(2)(f). “Technology transfers” were defined as the “export, by tangible or intangible means, of information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of conventional arms.” *Id.* annex A(d). Along with “technology transfers,” “[m]anufacture under foreign license” was also covered in the draft. *Id.* art. 4(2)(e). “Manufacture under foreign license” was defined as an “agreement whereby a person or entity in the exporting State grants a person or entity in the importing State an authorization to manufacture conventional arms which involves technology transfer or the use of technology or conventional arms previously supplied by the exporting State.” *Id.* annex A(c).

45. See PARKER, *supra* note 37.

enabling production of arms from foreign States that simply leave final assemblage for the recipient. However, developing countries objected that this provision would excuse denying them technology transfers, hampering their development.<sup>46</sup> Other countries objected that technology transfers could not be easily defined or controlled.<sup>47</sup> Still others thought inclusion of technology transfers would impair their inherent right to self-defense.<sup>48</sup>

Even without reference to technology transfers or manufacture under foreign license, consensus on a draft treaty could not be reached.<sup>49</sup> Iran, Syria, and North Korea objected to the draft text's section on diversions (discussed below).<sup>50</sup> The General Assembly mandated that another conference be commenced in March 2013.<sup>51</sup> But that conference again failed to reach consensus.<sup>52</sup> In response to the failure to reach a

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46. Cuba asserted that inclusion of technology transfers would hinder civilian use of technology for peaceful and legitimate purposes and ultimately hinder the progress of developing countries. See United Nations Conference on the Arms Trade Treaty, July 2–27, 2012, *Compilation of Views on the Elements of an Arms Trade Treaty*, at 27, U.N. Doc. A/CONF.217/2 (May 10, 2012) [hereinafter *Compilation of Views*].

47. India asserted that the issue involves commercial, legal, and intellectual property issues too complex to be included. *Id.* at 38; see NGO Comm. on Disarmament, Peace & Sec., *Report of the Second Preparatory Committee*, NGOC DPS.ORG, (Mar. 4, 2011), <http://www.ngocdps.org/the-second-preparatory-committee/report-of-the-week-negotiation>.

48. Saudi Arabia asserted that the inclusion of technology transfer would be used as a pretext to interfere with States' internal affairs and would diminish their capacity for legitimate self-defense. See *Compilation of Views*, *supra* note 46, at 84.

49. *Draft of the Arms Trade Treaty*, *supra* note 15.

50. Neil MacFarquhar, *U.N. Treaty to Control Arms Sales Hits Snag*, N.Y. TIMES, Mar. 28, 2013, [http://www.nytimes.com/2013/03/29/world/iran-and-north-korea-block-arms-trade-treaty.html?\\_r=0](http://www.nytimes.com/2013/03/29/world/iran-and-north-korea-block-arms-trade-treaty.html?_r=0).

51. U.N. GAOR, 67th Sess., 1st Comm., para. 2, U.N. Doc. A/C.1/67/L.11 (Oct. 18, 2012). The resolution passed overwhelmingly with 157 votes for the resolution, zero against, and eighteen abstentions. Notably, four of the five largest arm suppliers voted in favor of the resolution, with Russia being the abstention. See Daryl G. Kimball, *ATT Conference Set for March*, ARMSCONTROL.ORG (Dec., 2012), [http://www.armscontrol.org/act/2012\\_12/ATT-Conference-Set-for-March](http://www.armscontrol.org/act/2012_12/ATT-Conference-Set-for-March).

52. *Final United Nations Conference on the Arms Trade Treaty, President's Non-Paper*, REACHINGCRITICALWILL.ORG (Mar. 22, 2013), <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/documents/president-nonpaper-22March2013.pdf>. A slightly altered draft, *Final United Nations Conference on the Arms Trade Treaty, President's Non-Paper*, REACHINGCRITICALWILL.ORG (Mar. 27, 2013), <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/documents/president-nonpaper-27March2013.pdf>, became the Draft Decision and was submitted by the President of the Final Conference.

consensus, British Ambassador, Mark Lyall Grant, sent the “draft treaty to Secretary-General Ban Ki-moon and asked him on behalf of Mexico, Australia and a number of others to put it to a swift vote in the General Assembly.”<sup>53</sup>

During the UNGA’s 71st plenary meeting, Eduardo Ulibarri-Bilbao, the Costa Rican permanent representative, with support of over 100 States including the United States, introduced a draft resolution calling for the adoption of the most recent draft treaty.<sup>54</sup> On April 2, 2013, the General Assembly adopted the Arms Trade Treaty with 154 in favor, three votes against (Syria, North Korea, and Iran), and twenty-three abstentions, greatly eclipsing the two-thirds majority needed for adoption.<sup>55</sup> The Treaty was opened for signatures on June 3, 2013; sixty-seven countries signed the Treaty that day.<sup>56</sup>

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ATT, *supra* note 1. Due to the inability to reach consensus, Conference President Peter Woolcott concluded that the draft decision would not be adopted as was required by Rule 33 of the United Nations Conference on the ATT provisional rules of procedure. Final United Nations Conference on the Arms Trade Treaty, Mar. 18–28, 2013, *Report of the Final United Nations Conference on the Arms Trade Treaty*, para. 15, U.N. Doc. A/CONF.217/2013/2 (Apr. 2, 2013). Pursuant to Rule 33 of Procedure, President Woolcott concluded that no consensus was reached and the draft decision was not adopted. This rule states that “[t]he Conference shall take its decisions and consider the text of the Treaty by consensus, in accordance with General Assembly resolution 64/48.” United Nations Conference on the Arms Trade Treaty, July 2–27, 2012, *Provisional Rules of Procedure of the Conference*, U.N. Doc. A/CONF.21/L.1 (Mar. 7, 2012).

53. Louis Charbonneau, *U.N. General Assembly to vote on draft arms trade treaty?*, REUTERS (Apr. 1, 2013) <http://www.reuters.com/article/2013/04/01/us-arms-treaty-un-idUSBRE9300D020130401>.

54. *The Arms Trade Treaty as Contained in the Annex to Document A/CONF.217/2013/L.3*, Eduardo Ulibarri-Bilbao, UN Draft Resolution, A/67/L.58, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/67/PV.71](http://www.un.org/ga/search/view_doc.asp?symbol=A/67/PV.71). See generally Julian Pecquet, *US Demands Vote on United Nations Arms Trade Treaty Next Week*, HILL (March 29, 2013, 10:00 AM), <http://thehill.com/blogs/global-affairs/un-treaties/290917-obama-administration-pushes-for-vote-on-un-arms-trade-treaty-next-week>. This draft resolution requested “the Secretary-General, as depositary of the Treaty, to open it for signature on 3 June 2013” and called “upon all States to consider signing and, thereafter, according to their respective constitutional processes, becoming parties to the Treaty at the earliest possible date.” G.A. Res. 67/234 B, paras. 3–4, U.N. Doc. A/RES/67/234 B (Apr. 2, 2013).

55. For more information, see Draft Resolution Voting Record, U.N. Doc. A/67/L.58 (April 2, 2013), available at <http://www.un.org/disarmament/update/20130402/ATTVotingChart.pdf>.

56. Daryl G. Kimball, Arms Control Ass’n, *Arms Trade Treaty At a Glance*, ARMSCONTROL.ORG (July 2013), [http://www.armscontrol.org/factsheets/arms\\_trade\\_treaty](http://www.armscontrol.org/factsheets/arms_trade_treaty).

As of this writing, an additional fifty-one countries have signed the Treaty.<sup>57</sup> The ATT will officially enter into force ninety days after the fiftieth State ratifies, accepts, or approves it.<sup>58</sup> All remaining States may, of course, later ratify and accede to the Treaty.<sup>59</sup>

To support the ATT's ratification and implementation, the UN Trust Facility Supporting Cooperation on Arms Regulation ("UNSCAR") has been established as "a multi-donor flexible funding mechanism" to promote "South-South cooperation" and generally "improve effectiveness of assistance through better coordination, monitoring and matching of resources."<sup>60</sup> Moreover, the ATT's objective of preventing the diversion of weapons and reducing the power of illicit markets overlaps with the agendas of the UN Office of Drugs and Crime ("UNODC") and the UN Office of Disarmament Affairs ("UNODA"). The UNODC is responsible for enhancing law enforcement cooperation, confiscation of assets, and international cooperation in criminal matters.<sup>61</sup> The UNODA creates

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57. *Chapter XXVI Disarmament*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVI-8&chapter=26&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-8&chapter=26&lang=en) Mar 44.

58. *Id.*

59. ATT, *supra* note 1, art. 22.

60. UNSCAR: *UN Trust Facility Supporting Cooperation on Arms Regulation*, U.N. OFF. FOR DISARMAMENT AFFS., <http://www.un.org/disarmament/UNSCAR> (last visited Mar. 21, 2014). UNSCAR accepts proposals from UN Coordinating Action on Small Arms ("CASA") partners, international organizations, Non-Governmental Organizations, research institutes, and governments. UNSCAR, 2013 CALL FOR PROPOSALS 4 (2013), available at [http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/08/UNSCAR\\_Call\\_for\\_Proposals1.pdf](http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/08/UNSCAR_Call_for_Proposals1.pdf). It is funded by donors, such as Australia, Denmark, Germany, the Netherlands, Spain, and the United Kingdom. *Id.* at 7. Since CASA's duties are to operate as a coordinating effort, it is possible that once UNSCAR is fully implemented in January 2014, the UN Offices operating under the CASA umbrella may be assigned more responsibilities through the ATT. *Coordinating Action on Small Arms (CASA)*, U.N. PROGRAMME ACTION-IMPLEMENTATION SUPPORT SYSTEM, <http://www.poa-iss.org/CASA/CASA.aspx> (last visited Mar. 21, 2014). And since CASA is responsible for the International Small Arms Control Standards ("ISACS"), CASA's role in creating new standards for ATT ratifying states could grow as well. *Welcome to ISACS, INT'L SMALL ARMS CONTROL STANDARDS*, <http://www.smallarmsstandards.org> (last visited March 21, 2014).

61. The UN Office on Drugs and Crime's ("UNODC") Thematic Programme ("TP") on Criminal Justice and Crime Reform strives to ensure consistency in its approach to the ATT, based on the UNODC Strategic Framework for the period 2012–2013 and the UNODC Strategy 2012–2015, and in line with the relevant UN Conventions, standards, and norms on crime prevention. The TP "gives an overview of



transparent and accountable points of contact regarding conventional arms trade that are crucial to ensuring that the ATT is respected and upheld.<sup>62</sup> The fulfillment of ATT's objectives will require the commitment of these offices in coordination with other parts of the United Nations and law enforcement throughout the world.

## II. *PROHIBITED CONDUCT UNDER THE ATT*

The central objective of the ATT is to prohibit some but not all arms transfers. Prohibiting all arms transfers could undermine the pursuit of international peace and security, to say nothing of profits. The problem, however, is that leaving the distinction between licit and illicit arms transfers to any of nearly 200 sovereign States has produced the globally anarchic arms bazaar of our era. The international community did not have a legally binding mechanism to prevent conventional arms from flowing to armed conflicts or regions where human rights violations are widespread, and there was no widely applicable legal instrument holding States responsible for transferring arms to a tyrannical regime.<sup>63</sup> The ATT's primary challenge, therefore, is to propound, at the level of international governance, criteria for preventing conventional weapons' contribution to humanitarian horror.

It is worthwhile to briefly consider approaches not taken. One option could have been to define which arms transfers are allowed and to disallow all transfers that fail to satisfy that definition. This would have created a rebuttable presumption against any transfers that could have been rebutted only if an arms transfer satisfied criteria of humanitarian law and human

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outcomes to reach agreed objectives" and "a specific set of indicators" within a global framework. In addition, "the TP integrates the various components of the [UNODC's] mandates and expertise in the areas of advocacy, research, setting norms and providing technical assistance. As such, it reflects the UN Secretary General's [PoA] for the strengthening of the rule of law at the national and international level." UNODC, *Thematic Programme—Crime Prevention and Criminal Justice Reform 2012-2015*, <http://issat.dcaf.ch/Community-of-Practice/Resource-Library/Policy-and-Research-Papers/Thematic-Programme-Crime-Prevention-and-Criminal-Justice-Reform-2012-2015> (last visited March 21, 2014).

62. *About Us*. UNODA <http://www.un.org/disarmament/about/> (last visited March 21, 2014).

63. Hasan, *supra* note 5, at 4.

rights—the normative foundation on which an arms treaty must stand. Also, arms transfers could have been prohibited for use to commit aggression or repression. Other early suggestions emphasized criteria based on the end users' respect for democratic rights and norms, non-engagement in armed conflict, and intolerance of organized crime. It was proposed to prohibit transfers that seriously impair poverty reduction and socio-economic development or hamper the sustainable development of the recipient State. Negotiators removed a provision that would have required states to make feasible efforts to stop transfers of arms that are “[a]dversely impacting the development of the importing State.”<sup>64</sup> A significant debate concerned whether to include an absolute ban on arms transfers to non-State actors.<sup>65</sup>

The problem with all these formulations is that their precise application is elusive and highly contextual, entailing perpetual nuance and enabling each sovereign State to decide when to transfer arms to support the right of insurrection or self-defense, among other legally contentious concepts. A notable attribute of the ATT is its implicit recognition that the criteria of distinction between legal and prohibited arms transfers must clearly and consistently guide national arms export licensors. The goal of prohibiting illicit transfers would be of scant value, no matter how nobly intended, if export control officials could not apply objective criteria to actually stop prohibited arms transfers.

Put positively, the goal of prohibiting illicit arm transfers is best accomplished by specifying criteria that have reasonably clear legal significance for all States' law enforcers—criteria that compel policy reform to stanch the flow of conventional arms and which can be harmonized among nations in order to enable optimal multilateral cooperation against traffickers.<sup>66</sup> A key lesson from both nuclear and chemical arms control that is incorporated into the ATT is that to optimally contribute to

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64. *Draft of the Arms Trade Treaty*, *supra* note 15, art. 4(6)(e).

65. Nathan A. Sears, *Controlling Small Arms and Light Weapons Proliferation: The Potential of the Arms Trade Treaty*, 12 PATERSON REV. INT'L AFF. 35, 46–47 (2012).

66. See *Facilitator's Summary on Implementation and Application*, GENEVA-ACADEMY.CH (July 22, 2010), <http://www.geneva-academy.ch/RULAC/pdf/Implement-and-applica-22.07.2010.pdf>.

international peace and security and reduce human suffering, a weapons control treaty should exactly define prohibited activities concerning weapons.<sup>67</sup>

In the end, the ATT does not provide criteria for lawful arms transfers, leaving foreign policy choices entirely in the hands of individual States. Instead, two ATT articles prohibit arms transfers that would constitute an offense against already binding international obligations. The prohibitions contained in the ATT thus reiterate legal obligations that States are already bound to obey. Article 6 prohibits arms transfers that contravene UN Security Council embargoes and other international agreements relating to the international conventional arms trade, or would be used to commit grave international crimes.<sup>68</sup> Article 7 requires an objective assessment of each arms transfer and prohibits transfers if the State determines that the transfer poses “an overriding risk” of contributing to serious violations of international humanitarian or human rights law, including serious acts of gender-based violence, or violations of international conventions relating to terrorism and transnational organized crime.<sup>69</sup>

#### *A. Prohibited Arms Transfers Under Article 6*

Article 6 of the ATT contains three prohibitions. Article 6.1 prohibits States from authorizing transfers of conventional arms in violation of measures such as arms embargoes adopted by the UN Security Council acting under Chapter VII of the Charter. Article 6.2 prohibits a State from transferring arms in violation of international treaties and agreements relating to the transfer or trafficking of conventional arms. Article 6.3 prohibits arms transfers if the exporting State knows that the arms would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions, or other war crimes including attacks directed against civilians. While Article 6.2 merely reiterates obligations already assumed by States and

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67. See generally Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, 9 BROWN J. WORLD AFF. 217 (2002).

68. ATT, *supra* note 1, art. 6.3.

69. *Id.* art. 7.

therefore needs no further elaboration, the other two provisions merit attention.

### 1. Prohibition Against Transfers of Embargoed or Otherwise Restricted Arms

Security Council Resolutions under Chapter VII are the supreme determinations of how the United Nations maintains international peace and security.<sup>70</sup> The Security Council is endowed with responsibility to take necessary measures to control situations that threaten international peace and security, including imposition of arms embargoes that prohibit all Member States from transferring certain weapons to the embargoed government or entity.<sup>71</sup> Security Council arms embargoes were used twice during the Cold War, namely against Rhodesia (now Zimbabwe) in 1968 and South Africa in 1977, but their use accelerated after 1990.<sup>72</sup> More recently, the Security Council has prohibited supplying weapons to terrorists; while not technically an embargo targeted at any particular State, SC Resolution 1373 was adopted pursuant to Chapter VII of the Charter and therefore would fall within the scope of the ATT's prohibition.<sup>73</sup>

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70. See generally Sean Murphy, *The Role of the United Nations with Respect to the Means for Accomplishing the Maintenance and Restoration of Peace*, 26 GA. J. INT'L & COMP. L. 115, 116–17 (1996).

71. A decision to impose an arms embargo follows a Security Council determination of any threat to the peace, breach of the peace, or act of aggression that makes necessary the sanction's imposition. Article 41 authorizes the Security Council to apply non-military enforcement measures. U.N. Charter art. 41. Dr. Hasan explains how the wording used in a resolution represents the legal weight of each resolution, differentiating between resolutions that *call upon all States* and resolutions that *decide that all States shall*—the latter being more forceful. Hasan, *supra* note 5, at 159.

72. Sanctions were imposed on Somalia (1992), the National Patriotic Front of Liberia ("NPFL"), Libya (1992), Rwanda (1992), the Federal Republic of Yugoslavia (1996), Sierra Leone (1997), Afghanistan (1998), Eritrea and Ethiopia (2000), Iran (2006), and Libya (2011). *United Nations Security Council Sanctions Committees*, UNITED NATIONS (Jan. 2006), <http://www.un.org/sc/committees/>; Hasan, *supra* note 5, at 162. Dr. Hasan notes that fifty-seven armed conflicts raged during this period and that the sanctions against Afghanistan and Sudan are unique in that their arms embargoes followed other, more general embargoes, whereas all of the others led with arms embargoes. See Hasan, *supra* note 5, at 176. See James D. Fry, *Of Pinpricks and Cannon Shots: UN Arms Embargoes and Peacekeeping as Coercive Disarmament Measures*, 17 U.C. DAVIS J. INT'L L. & POL'Y 213, 217 (2011).

73. Paragraph 2 states that States shall "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by

Because conventional arms are the weapons of choice in most conflicts, they constitute the majority of transfers that can be impacted by an embargo.<sup>74</sup> Arms embargoes are widely seen as smarter and preferable to economic embargoes because they target the combatants and limit humanitarian impacts, thereby inducing military stalemates and preventing conflicts from escalating.<sup>75</sup> As of this writing, there are ten Security Council embargoes that include a prohibition of transferring arms, ammunition, military equipment, goods, and related services to targeted States, armed groups, or individuals.<sup>76</sup>

Imposition of arms embargoes is highly controversial. Some critics allege they are ineffective and have a low rate of compliance.<sup>77</sup> With so many small arms available in the market, an embargo still leaves a purchaser with a range of sellers in the international marketplace.<sup>78</sup> Arms embargoes have no impact on stockpiles of weapons that the combatants have accumulated before imposition of the embargo and no Security Council arms embargo has prescribed mechanisms for collecting and

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suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.” S.C. Res. 1373, para 2(a), U.N. Doc. S/RES/1373 (Sep. 28, 2001).

74. Hasan *supra*, note 5, at 46.

75. Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 *LAW & POLYINT’L BUS.* 11, 12 (2000).

76. Indeed, whenever the Security Council has imposed sanctions, it always has included an arms embargo on the target State. *See Use of Sanctions under Chapter VII of the UN Charter*, UNITED NATIONS (Jan. 2006), <http://www.un.org/sc/committees>.

77. “There are repeated violations of the arms embargoes, in particular the continuing transfer of small arms, as the United Nations Secretary General admitted in his report, investigations of arms embargo violations have exposed international networks involved in the illicit trade and brokering of small arms.” Hasan, *supra* note 5, at 164. *See generally* Jennifer L. Erickson, *Stopping the Legal Flow of Weapons: Compliance with Arms Embargoes, 1981–2004*, 50 *J. PEACE RES.* 159 (2013); Guy Lamb, *Beyond ‘Shadow-boxing’ and ‘Lip service’: The Enforcement of Arms Embargoes in Africa*, *INST. FOR. SEC. STUD.* 2 (Apr. 2007), <http://www.issafrica.org/uploads/Paper135.pdf>.

78. The arms embargo imposed on the former Yugoslavia by Security Council Resolution 713 (1991), for example, did not work well to stop the flow of arms as the weapons kept coming to the warring parties through the use of covert government supplies or the black market. *See* Michael R. Fowler & Jessica Fryrear, *Collective Security and the Fighting in the Balkans*, 30 *N. KY. L. REV.* 299, 333 (2003) (discussing how the arms embargo in the Balkans in 1992 only prolonged the fighting). The arms embargo imposed on Somalia since 1992 has not substantially cut off the availability of small arms there; the quantity and diversity of small arms available in Somalia are greater now than at any time since the early 1990s. Hasan, *supra* note 5, at 164.

destroying amassed weapons.<sup>79</sup> Indeed, violence could long persist in an area already flooded with weapons before an embargo was imposed.

If an arms embargo does work, it may penalize the weaker party, often ensuring a one-sided military victory. Thus, arms embargoes have been accused of tending to favor the warring faction that has access to government military ordnance and industries while making it very difficult for adversaries to organize and defend themselves.<sup>80</sup> Most important for this discussion, some experts contend that arms embargoes, especially in view of their weak enforcement and poor monitoring, accelerate trafficking. Traffickers' profits may accelerate with the imposition of an embargo, creating lucrative markets for illicit trade. "These profits enrich precisely those people that the embargo is intended to hurt, creating a financial interest in prolonged conflict."<sup>81</sup>

The issue of how international law treats noncompliance with arms embargoes is complicated because there are virtually no sanctions for violations, especially by non-State actors who transfer weapons to the embargoed group.<sup>82</sup> Each State is responsible for enforcing compliance in its own courts pursuant to its own export control laws. Until the ATT, there was no explicit international legal requirement that States effectively implement such laws, much less that they punish export control violators. The Security Council has established the Sanctions Committee to monitor and verify that an arms embargo is not being violated but it has no fixed mechanism to prevent

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79. In addition, in a situation where the conflict is dependent on home-grown weaponry, an externally sanctioned arms embargo has little or no relevance to reducing the armed conflict. *See generally* DAMIEN FRUCHART ET AL., UNITED NATIONS ARMS EMBARGOES: THEIR IMPACT ON ARMS FLOWS AND TARGET BEHAVIOUR 54 (2007).

80. Arguably, the arms embargo against the former Yugoslavia by resolution 713 (1991) was "fundamentally unjust because it locked in place the pre-war balance of power, unfairly disadvantaged the Bosnian forces, and thereby unnecessarily prolonged the conflict." Hasan, *supra* note 5, at 163–64 (citations omitted).

81. Hufbauer & Oegg, *supra* note 75.

82. The UN Security Council has requested that Member States pass national legislation making violation of an arms embargo a criminal offense. S.C. Res. 1196, para. 2, U.N. Doc. S/RES/1196 (Sept. 16, 1998).

sanctioned arms transfers. Instances of a supplier State being hit with sanctions for transferring small arms illegally are rare.<sup>83</sup>

The ATT does not resolve the myriad debates that the Security Council must undertake whenever it considers arms embargoes, nor could it add any legal weight to whatever the Security Council may decide to do. The General Assembly does not have authority to add or subtract in this context. What is significant is that the ATT's first prohibition is for transfers that violate Security Council embargoes. Article 6.1 reaffirms the Security Council's authority over matters of international peace and security and leaves to the Security Council the policy merits of imposing an arms embargo. Its importance is to clarify that when an arms embargo is imposed, an arms transfers from a State's jurisdiction is an international wrong—a delict—for which the supplier State must be responsible.

Thus, the ATT links violations of Security Council arms embargoes to the widening legal implications of *State responsibility*,<sup>84</sup> raising the potential for States to be held responsible for complicity in an embargoed transfer. Viewed from the perspective of arms supplier States, before the ATT, the Security Council's arms embargoes were matters of exclusively political responsibility. A supplier State might suffer the indignation of other States if conventional arms from its jurisdiction were transferred (by whatever means) to a targeted State, but only if the evidence of such transfers was sufficiently manifest and no other political factors counselled in its favor.<sup>85</sup> After the ATT, a supplier State has to consider that prohibited

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83. In 2001, the UN Security Council imposed a new round of sanctions on Liberian President Charles Taylor for arming the embargoes forces of the Revolutionary United Front in Sierra Leone. S.C. Res. 1343, para. 6, U.N. Doc. S/RES/1343 (Mar. 7, 2001).

84. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 55 (2001) [hereinafter ILC Responsibility]. See generally Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity "With a View" Toward Extended State Responsibility*, 20 FLA J. INT'L L. 25 (2008).

85. The Stockholm International Peace Research Institute ("SIPRI") has recommended that the Security Council should target the States and non-State actors implicated in the violations of an arms embargo by at least naming and shaming. In practice, it may mean the non-compliant countries and/or entities are explicitly mentioned in the related report and meetings. See Paul Holtom & Mark Bromley, *Implementing an Arms Trade Treaty: Lessons on Reporting and Monitoring from Existing Mechanisms* (Stockholm Int'l Peace Research Inst., Policy Paper No. 282011).

arms transfers from its jurisdiction are, by operation of legal doctrine, its responsibility for which it can be held legally accountable.

Even more far-reaching is that the ATT links the mandate of arms embargoes to the requirements of establishing a national control system and requiring adoption of measures to prevent small arms diversions, discussed below. Thus, a Security Council arms embargo, before the ATT, was a negative command against transferring embargoed arms, but positive obligations to prevent wrongful arms transfers by private parties or unauthorized government officials went unspecified. Accordingly, there was no likely price to pay if a supplier State's involvement in the wrongful transfer was limited to failing to have a legal infrastructure that could effectively bar the transfer. After the ATT's imposition of positive obligations to establish such an infrastructure, passivity in the face of prohibited conduct is no longer a defense.

As an aside, it has been argued that the ATT will undercut United States embargoes that are typically more severe and comprehensive than Security Council embargoes:

Because the projected universal treaty will be based upon the consensus views of all participating U.N. member states, it will enshrine the lowest-common-denominator standards for importing, exporting, and transferring conventional weapons. The treaty's standards will therefore be lower than U.S. standards. It would also open the U.S. to a legal challenge—albeit a frivolous one—from embargoed states such as Iran, which would argue that the U.S. is illegally constraining trade with it and is violating the “common international standards” enshrined in the treaty.<sup>86</sup>

It is of course true that the United States has rigorously restrictive arms export embargoes that are designed to achieve its foreign policy objectives. But it is patently nonsense to argue that US embargoes violate international law or standards or somehow contradict the language of the ATT, which in no way

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86. Theodore R. Bromund & Steven Groves, *The U.N.'s Arms Trade Treaty: A Dangerous Multilateral Mistake in the Making*, HERITAGE FOUND. (Aug. 21, 2009), <http://www.heritage.org/research/reports/2009/08/the-uns-arms-trade-treaty-a-dangerous-multilateral-mistake-in-the-making>.



requires arms transfers in contravention of any nation's policies, including the United States.

## 2. Prohibition Against Arms Transfers for Committing Grave International Crimes

The list of grave crimes in ATT Article 6.3 are the core crimes of the Rome Statute and prosecutable in the International Criminal Court.<sup>87</sup> These are crimes that exceed all others in scope, heinousness, and severity of consequences,<sup>88</sup> and these are crimes that virtually always entail substantial quantities of conventional arms. Yet, as long-abhorred as these crimes are, culpability has not extended to the suppliers of arms to the perpetrators of inhumane crimes. Arms suppliers of perpetrators of heinous crimes have not been held liable for those crimes absent more extensive evidence of having been engaged in the crimes as a joint criminal enterprise. Indeed, prosecutions of conventional weapons sellers for their buyers' international crimes have been less than rare since the prosecution of Nazi industrialists at Nuremberg.<sup>89</sup>

The ATT Article 6.3 prohibition is significant, therefore, in that it extends responsibility for grave international crimes to the supplying State.<sup>90</sup> This is an important accretion to the law of State responsibility for it means that the authorization of such

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87. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

88. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* (2011).

89. See generally Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651 (2005).

90. Ramadansyah Hasan has argued that

The Articles demand States maximize the law's capacity in using the ILC principle to hold responsible those who are responsible for assisting the commission of human rights violations and other internationally wrongful acts. . . . Based on article 16 of the ILC's Articles on State responsibility, a State transferring to a recipient State which later uses the arms to commit internationally wrongful acts may be held accountable for having a supporting role. However, there are limits to the scope of responsibility of article 16; the first, the assisting State must have knowledge of the circumstances that make the conduct of the receiving State unlawful; secondly, the supply of weapons must be given with the view to facilitating the commission of the wrongful act; thirdly, the act must be such that it would have been wrongful had it been executed by the assisting State itself.

Hasan, *supra* note 5, at 142

arms transfers constitutes commission of a newly pronounced international wrong, and every arms-transferring official is at risk of violating the ATT if authorized transfers of arms are used to commit grave international crimes.

The key to establishing responsibility for this wrong is the requirement of “knowledge at the time of authorization.” *Knowledge* is a legal standard that is higher than strict liability but lower than international criminal law’s requirement of intention to aid and abet the wrongful act. *Knowledge* is a legal standard that is not often used in international arms control treaties. In the domain of public international law, the *knowledge* standard is invoked most in connection with the imputability of actions by subordinate officials to the State: When is the State responsible for an official’s knowledge? This can be a difficult question, especially in situations (e.g. human rights violations) where the State has failed to prevent wrongful acts because it allegedly did not know of the wrongful behavior; had it known, it would be at least arguable that it was responsible for undertaking appropriate action.<sup>91</sup>

In the domain of corporate law, civil suits against corporate decisionmakers may proceed for violating a legal obligation of which a corporate official should have had knowledge. This constitutes a low threshold of responsibility.<sup>92</sup> This standard

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91. Ingrid Wuerth has argued that:

[M]otivation is generally irrelevant in evaluating acquiescence as evidence of *opinio juris*. Others have noted that if customary international law is grounded in state consent, then acquiescence should count only if a state “know[s] that failure to object will be taken as acceptance.” Indeed, acquiescence is often criticized as a basis for inferring the consent of states to customary international law because nations may acquiesce from a lack of legal interest in the issue, from a lack of knowledge that their actions will be interpreted as acquiescence, or for other policy reasons.

Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AM. J. INT’L L. 731, 750 (2012).

92. Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting Is Knowledge*, 10 NW. J. INT’L HUM. RIGHTS, 119 (2011). Under the law of civil remedies, in both civil and common law jurisdictions, a company may be liable if a reasonable corporate official exercising relevant responsibility, with the information reasonably available at the time, would have known that there was a risk that its actions could cause a prohibited harm. To determine what a reasonable corporate official should have known, courts consider best practices in due diligence and risk assessment. Accordingly, as societal expectations develop and expand, the expectations placed on a reasonable company will as well.

importantly applies in human rights actions where a legal entity may have legal responsibility if the authorized official knows that the entity's conduct poses a reasonable risk of contributing to such abuses.<sup>93</sup> In these contexts 'willful blindness'—the act of disabling access to knowledge—is not permitted by the law of civil remedies.<sup>94</sup> The requisite *knowledge* standard may be even lower in connection with environmental harm: an entity may be held liable even where it has no actual knowledge but, as a matter of precautionary obligation, it should have taken deliberate steps to find out about the potential harm caused by its activities.<sup>95</sup>

The *knowledge* standard in ATT Article 6.3, in light of the treaty's avowed purpose to stanch the illicit international arms trade, means that if an authorized official should have known about the risks that transferred arms will be used to commit grave international crimes, it is an international wrong to authorize those transfers and responsibility must follow. More specifically, *knowledge* may refer to the following markers: (1) an authorized official's own inquiries produce information, or the authorized official should have undertaken such inquiries; (2) information is publicly available, including reports by the United Nations, other governments, the media, and relevant *publicists*; (3) information is brought to the official by an outside source such as an NGO; and (4) circumstances are sufficiently unusual to put reasonable officials on notice, in light of their entire legal responsibilities, of a suspicious purpose for a particular transfer.

All this would suggest that the *knowledge* standard is satisfied if wrongful activity is brought to official attention and if relevant officials do not undertake reasonable measures to investigate and stop the authorization of that transfer if the circumstances warrant. Failure to have an effectively operating export control

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93. See generally ILIAS BANTEKAS, *INTERNATIONAL CRIMINAL LAW* (4th ed. 2010) for discussion of *dolus eventualis*, where an actor knows that harm may occur as a result of its conduct, and even though it hopes that the harm does not take place, it consents to the harm by carrying out the course of conduct anyway.

94. Walker, *supra* note 92.

95. *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, [2001] 2 Y.B. Int'l L. Comm'n 146, U.N. Doc A/CN.4/SER.A/2001/Add.1 (Part 2).

system in place is no defense; indeed, it might be evidence of State responsibility for the wrongful transfer.

*B. Prohibition on Arms Transfers That Contribute to Human Rights and Humanitarian Law Violations or to Violations of Terrorism and Crime Conventions*

Article 6's prohibitions do not require any particular action except to not transfer banned arms. Article 7 operates differently, obligating States to assess all exports' potential for negative consequences. If the exporting State determines that there is an overriding risk of such consequences, it shall not authorize the export. Article 7 defines negative consequences as violations of: (1) international humanitarian law; (2) international human rights law; (3) international conventions or protocols relating to terrorism;<sup>96</sup> and (4) international conventions or protocols relating to transnational organized crime.<sup>97</sup>

In contrast to Article 6's prohibitions that should apply objectively, Article 7 represents an explicit requirement for each State to consider certain implications every time it authorizes an arms transfer; it further requires each State to refuse to export arms that it determines pose an overriding risk of proscribed harms. This is not a per se obligation; it is conceivable that an assessment undertaken in good faith fails to identify even an appreciable risk that the arms will be used wrongfully. In

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96. See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11081, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, TIAS 13075 2178 U.N.T.S. 197; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89.

97. United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, TIAS 13127, 2225 U.N.T.S. 209 and the Protocols Thereto. These protocols include: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S., 507; Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208.

international law terms, the ATT's assessment requirement is one of conduct, not of result. Thus, a transfer of arms to a recipient who uses them for a proscribed harm does not signify *per se* that the exporting State has violated Article 7.

The ATT gives little criteria for the conduct of such assessment, requiring that it be done "in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State."<sup>98</sup> It is difficult, accordingly, to specify the conditions for establishing that a State has or has not complied with Article 7. But there can be no unassessed legal arms transfers. Put negatively, the ATT Article 7 prohibition means that an exporting State may not claim legal innocence for its arms transfers on the grounds that, under its regulatory system, it made no inquiry about the risk that the purchaser of the exported arms will use them to violate international law. As with regard to Article 6.3's requirement of knowledge, the defense of willful blindness is now unavailable.

Yet, Article 7's scope is far broader than that of Article 6.3. Article 6.3 is concerned only with the gravest international crimes which, precisely because of their unusual degree of heinousness, resonate throughout humanity's conscience. Yet, there are many violations of human rights and international humanitarian law that do not satisfy the rigorous criteria of grave international crimes. Comparably, the scope of international terrorism conventions and international conventions against transnational crime cumulatively prescribe interwoven regulatory obligations on States' execution of law enforcement responsibilities.

The ATT, by incorporating these very dynamic domains of international law, adds the mandate of a State determination, pursuant to an assessment, that an arms export pose no overriding risk of contributing to any such violations. Each State retains authority to make that determination by itself; the earlier discussed subjective considerations inherent in terms as broad as "international human rights" and "international humanitarian law" are to be resolved at the national level, but they must not be ignored at the national level.

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98. ATT, *supra* note 1, art. 7.

In this regard, ATT Article 7 may offer some of the promise of achieving what environmental impact assessments have achieved in a very different domain. In both contexts, there must be official consideration of the impacts of a proposed action for broadly defined consequences. The requirement to assess does not mandate specific substantive outcomes in particular situations. Yet, mandating that an official assessment be undertaken has important salutary effects by making it difficult for officials, in assessing evidence of human rights violations, to then authorize arms transfers despite their own assessment. A mandated assessment process certainly removes the *we didn't know* defense, and the process of assessing enables advocacy by proponents of curtailing arms transfers.

The Article 7 assessment requirement will likely be executed with Article 11.2's requirement that States, in connection with any conventional arms transfer, assess the risk that transferred conventional arms could be diverted.<sup>99</sup> Article 11.2 focuses principally on the potential that the named recipient will never receive the arms or at least will not hold them for long, rather than on what the final recipient is likely to do with the weapons. The 11.2 assessment must focus on manifestly criminal behavior, such as theft, smuggling, or fraud. Consideration must be devoted not only to the end user's reason for wanting the arms, but also its ability to secure them throughout the arms' useful lives. And the risk of theft or misdirection during the arms' transit route and at ports through which the arms will pass must also be assessed.

Altogether, the ATT prohibits conventional arms transfers unless the State determines, following an assessment, that the conventional arms will not be used to commit international wrongs or be diverted for such purposes. At a minimum, an assessment means consideration of available information, and the ATT contains extensive information gathering and exchange requirements. For example, each importing State must provide, upon request, relevant information to the exporting State to assist it in conducting its assessment.<sup>100</sup> Moreover, the exporting State Party must ensure that all

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99. *Id.* art. 11.2.

100. *Id.* art. 8.1.

authorizations for the exported arms are detailed and issued in advance and must make available information about the exported arms, upon request, to the importing State Party and to the transit or trans-shipment States Parties.<sup>101</sup> After an authorization has been granted, if an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.<sup>102</sup> This entire process will be informed by UN officials working with many NGOs who have, unfortunately, too many years' experience of monitoring the flood of arms to committers of atrocities and other criminals.

### III. *ANTI-DIVERSION MEASURES*

Diversion is the act of shifting conventional arms from legal to illicit markets. The illicit conventional arms market is estimated, by dollar value, to account for twenty percent of all conventional arms transactions.<sup>103</sup> The distinction between prohibiting certain authorized arms transfers and addressing illicit conventional arms diversion is important as a matter of State responsibility. States are, by definition, subjects of international law in the sense that they are bound by it and violations of international law must incur responsibility,<sup>104</sup> but criminals are objects of law who must be addressed by empowering transnational law enforcement.

Yet, to see these topics in isolation is to miss the connections between wrongly authorized transfers and diverted arms. As most diversion of conventional arms entails complicity of government agents,<sup>105</sup> enforcing prohibitions against States transferring conventional arms for illegal purposes contributes to and is reinforced by effective policies to stanch the illicit arms

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101. *Id.* art. 7.6.

102. *Id.* art. 7.7

103. See generally WENDY CUKIER, *THE ILLICIT TRADE IN SMALL ARMS: ADDRESSING THE PROBLEM OF DIVERSION*, PLOUGHSHARES REPORT (2008).

104. *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, *supra* note 95, art. 1 ("Every internationally wrongful act of a State entails the international responsibility of that State.").

105. See generally Rachel Stohl, *Fighting the Illicit Trafficking of Small Arms*, SAIS REV. INT'L AFFS., Winter-Spring 2005, at 59.

market. Stanching criminal transfers and prohibiting States' wrongful transfers are the twin pillars on which the ATT is built.

Diversion occurs by varied means, depending on the specific types of weapons, their age and location, and the legal user's degree of control, among other factors. It is unclear how much of the illicit weapons market is represented by re-use of durable arms, diversion of arms from licit markets, or sale of new arms. Indeed, to refer to "the illicit conventional arms trade" is to suggest a singularity that in fact does not exist. The illicit flow of guns across the US-Mexico border<sup>106</sup> follows different incentives and faces different law enforcement opposition than does the flow of weapons through southwest Asia or the flow of weapons into sub-Saharan Africa.<sup>107</sup> In some contexts, conventional arms are linked to narcotics trafficking,<sup>108</sup> while in other contexts conventional arms are linked to human rights atrocities or fanatical terrorism.<sup>109</sup> Generalizations as to all these markets should be offered cautiously. Moreover, the nature of illicit trafficking limits the availability of reliable data about the sources of arms used in crime and conflict. Studies based on recovered weapons represent a small fraction of weapons used.<sup>110</sup>

What may be reasonably offered is the increasing evidence of intersection of global criminal networks capable of adapting flexible routings as necessary to meet constantly fluctuating demand, operating in a gray zone of legality and taking

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106. See Arindrajit Dube et al., *Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico*, 107 AM. POL. SCI. REV. 397, 402 (2012).

107. See Stephanie L. Kotecki, *The Human Rights Costs of China's Arms Sales to Sudan—A Violation of International Law on Two Fronts*, 17 PAC. RIM L. & POL'Y J. 209 (2008).

108. See Asif Efrat, *Governing Guns, Opposing Opium: A Theory of Internationally Regulated Goods* 29 (Cornell Law School, Working Paper No. 41, 2008), available at [http://scholarship.law.cornell.edu/clsops\\_papers/41](http://scholarship.law.cornell.edu/clsops_papers/41).

109. See JOHN ROLLINS ET AL., CONG. RESEARCH SERV., R41004, INTERNATIONAL TERRORISM AND TRANSNATIONAL CRIME: SECURITY THREATS, U.S. POLICY, AND CONSIDERATIONS FOR CONGRESS 10 (2010).

110. While the International Criminal Police Organization ("Interpol") collects and aggregates data annually through the Interpol Weapons Electronic Tracing System ("IWETS"), participation in IWETS is voluntary and the number of incidents reported is relatively low. WENDY CUKIER & VICTOR W. SIDEL, *THE GLOBAL GUN EPIDEMIC: FROM SATURDAY NIGHT SPECIALS TO AK-47s*, at 89 (2005).



advantage of licit markets whenever possible.<sup>111</sup> Much of today's illicit market for conventional arms has evolved from superpower operations during the long and lucrative Cold War. Its end has driven arms producers and distributors to take advantage of transnational smuggling networks that have sustained much of the world's violence. Today's transferors of illicit arms take advantage of and reinforce an international criminal infrastructure for money-laundering, identity fraud, and human trafficking.

Links, interactions, and dependencies among different networks suggest that there are no simple solutions to the problems of the proliferation and misuse of these weapons. Licit, covert, and illicit networks for large-scale distribution of small arms and ammunition share various transportation, banking, and personnel networks, thereby creating a complex global system.<sup>112</sup>

The ATT's provisions for combating these networks stand atop measures promulgated by the Firearms Protocol, the UN Program of Action, the International Tracing Instrument, numerous regional and sub-regional efforts, and the efforts of international organizations including Interpol to strengthen national law enforcement so as to make illicit arms trading more difficult. For example, Article 9 requires each State Party to regulate, where necessary and feasible, the transit or transshipment of conventional arms through its territory or under its jurisdiction. This provision reinforces the obligation in the Firearms Protocol, *supra*, for transit States to give written notice that there is no objection to the transit.<sup>113</sup>

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111. See Gretchen Peters, *The Intersection of Crime and Conflict*, in THE "NEW" FACE OF TRANSNATIONAL CRIME ORGANIZATIONS (TCOS): A GEOPOLITICAL PERSPECTIVE AND IMPLICATIONS TO U.S. NATIONAL SECURITY 81, 85 (Ben Riley & Kathleen Kiernan eds., 2013), available at <http://hdl.handle.net/10945/30346>; Vesna Markovic, *The Contemporary Face of Transnational Criminal Organizations and the Threat They Pose to U.S. National Interest: A Global Perspective*, in THE "NEW" FACE OF TRANSNATIONAL CRIME ORGANIZATIONS (TCOS), *supra*, at 110, 118; JEREMY HAKEN, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD (2011); Regan Damron, *Game-Changing Developments in the Proliferation of Small Arms and Light Weapons: Anonymizing Technologies and Additive Manufacturing*, in THE "NEW" FACE OF TRANSNATIONAL CRIME ORGANIZATIONS (TCOS), *supra*, at 160.

112. CUKIER, *supra* note 103.

113. Firearms Protocol, *supra* note 17, art. 10.2

Thus, the ATT reinforces legal principles that have been well-appreciated in the United Nations for at least the past two decades. The ATT's importance, from the perspective of international law, is that there is mounting evidence that combating the illicit trade in conventional arms is now a matter of mutual or humanity-wide interest. Put differently, diversion of conventional arms transfers is emerging into an international crime.

ATT Article 11 propounds measures to combat conventional arms diversion. As earlier discussed, States must assess the risks of diversion of a transfer of conventional arms, including by conducting an examination of the parties involved in the transfer and by requiring additional documentation. In light of that assessment, exporting States must consider establishing "mitigation measures such as confidence-building measures or jointly developed and agreed programmes."<sup>114</sup> Indeed, all States involved in the transfer of conventional arms, including import, transit, trans-shipment and export States, should cooperate and exchange information to mitigate the risk of diversion.<sup>115</sup> More generally, States Parties are encouraged to share information with one another on effective measures to address diversion including information on corruption, international trafficking routes, illicit brokers (discussed below), sources of illicit supply, methods of concealment, common points of dispatch, and destinations used by organized groups engaged in diversion.<sup>116</sup>

This Article 11 assessment, like Article 7's required assessment of the risk that a transfer will contribute to serious violations of international law, denies exporting States the defense of *we didn't know what would happen because we didn't ask*. If conventional arms are wrongfully diverted, the exporting State can escape responsibility only by establishing that it assessed the risk of diversion yet determined the risk to be not overriding, despite the fact that the diversion actually happened. Moreover, as with the Article 7 assessment, UN officials, officials of other countries, law enforcers from every jurisdiction, and NGOs will likely proffer evidence on everything from border

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114. ATT, *supra* note 1, art. 11.2.

115. *Id.* art. 11.3.

116. *Id.* art. 11.5

and customs security to the risks of piracy. The assessment process, in and of itself, suggests better transparency and more informed decisions. Altogether, it is difficult for exporting States to ignore the risks of diversion, which makes it more difficult for arms criminals to take advantage of licit commercial avenues.

There are, in addition, two ATT provisions that deserve comment in terms of their contribution to preventing conventional arms diversion: (1) regulation of conventional arms brokers and (2) legal cooperation and information sharing to prevent and eradicate diversion of conventional arms.

#### *A. Regulating Brokers*

ATT Article 10 requires each State Party to regulate brokering under its jurisdiction. “Brokers” who negotiate and make arrangements for arms transactions are crucial links in the increasingly globalized and differentiated conventional arms trade.<sup>117</sup> They constitute the hematological system of the arms network, facilitating transport, logistics, warehousing, financing, insuring, and licensing of arms transfers. More simply, brokers find the arms, mediate the commercial transaction, obtain necessary legal and other documentation, and ensure delivery.<sup>118</sup>

As long as weapons are needed for self-defense and maintenance of domestic order, weapons brokers will be essential elements in the supply chain. The problem is that some brokers devote their expertise to illicitly diverting conventional

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117. “Although there is not yet a universally agreed definition of the term ‘illicit arms brokering’, it usually refers in general to those acts of mediation to arrange arms transfers: (i) whose intended recipients are groups, individuals or states that are prohibited by national or international law from possessing or acquiring such arms—for example, embargoed states, armed groups and criminal gangs, including those believed to engage in terrorist attacks; and (ii) where a broker carries out some other activity in contravention of the national law applicable where the broker operates, resides or holds nationality, for example failing to acquire prior authorization from the relevant state to conduct arms brokering within that jurisdiction. In addition, some activities of arms brokers may be criminal under more general laws—such as statutes that outlaw the transfer of arms without state approval, or bribery or money laundering, which are illegal in most if not all states.” U.N. Inst. Disarmament Res., *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons—Scope and Implications*, U.N. Doc UNIDIR/2006/23 (2006) [hereinafter UNIDIR Report].

118. *Id.* at 46; see also Katharine Orlovsky, Note, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT’L & COMP. L. REV. 343, 348 n.19 (2006).

arms, not only as venal conduits but also as stokers of conflict, repression, and crime whose actions have most grave consequences for humanity.

In 1996, the UN International Commission of Inquiry on arms flows to the perpetrators of the Rwandan Genocide made the first reference to brokering activities. Brokers reappeared in subsequent UN investigations of the violation of arms embargoes against Angola, the Democratic Republic of the Congo, Liberia, Sierra Leone, and Somalia.<sup>119</sup> In the UNPoA, discussed earlier, Member States agreed to develop national legislation or administrative practices regulating weapons brokers including the registration of brokers, licensing or authorization of brokering transactions, and penalties for illicit brokering activities performed within the state's jurisdiction and control.<sup>120</sup> The Firearms Protocol, also discussed earlier, urges States to consider brokers' registration and authorization as well as disclosure of the identities of brokers who are involved in any arms import or export activity.<sup>121</sup> Various regional and multilateral organizations have established instruments for regulating brokers.<sup>122</sup>

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119. UNIDIR Report, *supra* note 117, at xvi–xvii. In 2001, a Group of Governmental Experts (“GGE”) concluded that Member States need to establish national systems of control for brokering and related activities occurring within their territorial jurisdiction, in order to deal effectively with illicit or undesirable arms transfers. *Id.* at xvii.

120. Small Arms Review Conference, *supra* note 19, part II, para. 14.

121. Firearms Protocol, *supra* note 17, art. 15.

122. In Europe, the European Union and the OSCE have set standards for the control of brokering of all conventional arms. Participating States in the Wassenaar Arrangement—including the leading conventional arms producing and exporting states—agreed in 2003 to a set of common Elements for Effective Legislation on Arms Brokering. Org. for Sec. & Co-operation in Eur., Summary Report on replies provided by participating States on the one-off information exchange with regard to OSCE Principles on the Control of Brokering in Small Arms and Light Weapons, FSC.GAL/95/11 (Sept. 1, 2011). The Organization of American States’ (“OAS”) Inter-American Drug Abuse Control Commission (“CICAD”) agreed to the Model Regulations to Control Brokers of Small Arms. In Africa, the African Union is committed to controlling the brokering of small arms and light weapons, and three binding sub-regional agreements reinforce these commitments. In May 2002, the Association of Southeast Asian Nations (“ASEAN”) agreed to preventing arms smuggling as part of transnational crime, and in 2004 the Asia-Pacific Economic Cooperation (“APEC”) agreed to ban the use of nongovernmental brokers and brokering services for transfers of manportable air-defense systems (“MANPADS”). The Asian and Middle East regions so far lack any agreed standards to control arms brokering.

The obligation to regulate brokers and their transactions is emerging as a principle of mutual interest among States in the international community. The obligation's normative underpinnings for preventing conflict and crime are, by now, so widely accepted as to need little defense. Today's reality is that illicit weapons brokers face an altogether more hostile legal environment than their predecessors did. Yesterday's daring gunrunner is now and must be a criminal. More brokers have been prosecuted in the last decade than ever before, including Viktor Bout, arguably the most famous arms broker who will spend the rest of his life in prison. In much of the world, only legally accountable specialists and firms are allowed to broker conventional arms.

The ATT's reiteration of the obligation to regulate brokers should be seen as reinforcing the onus of State responsibility for not adequately regulating arms brokers. For it is where legal regulation of brokers is weakest that fires of violence rage most fiercely, fueled by the remaining criminal networks of arms transfers. The duty to regulate brokers has evolved over the course of a decade from a request to a mutual commitment to a reiterated obligation that is a pillar of international peace and security. The ATT suggests that humanity will not tolerate inaction in this context: States are responsible for regulating arms brokers in their jurisdiction and under their control, and international cooperation to fulfill that responsibility must be an important priority.

#### *B. Detecting and Stopping Arms Traffickers*

At the heart of stanching the illicit trade in conventional arms is enabling law enforcement to detect and prevent incidents of illicit trading as well as to investigate and arrest arms traffickers. Arms criminals operate through markets where their shipments can be kept secret and where law enforcement capabilities are weakest. For the most part, they buy, transport, and trans-ship arms through nations that are neither the producer nor ultimate user of the weapons. In arms markets where activities are segmented across people in multiple nations, each of whom has only scant responsibility for the criminal enterprise as a whole, dedication of law enforcement resources to stopping the enterprise can and often has been

seen as a low priority. As with so much of international crime today, the victims of illicit arms transfers are not represented in nations where dedication of law enforcement resources could actually stop illicit transfers.

The problem can best be expressed in jurisdictional terms. Consider as a question of jurisdiction: stashes of arms in Country A are diverted by a trafficker who is a citizen of Country B, and are delivered through multiple trans-shipment points in Countries C, D, and E, to criminal recipients in Country F (in the midst of substantial strife) where militias or gangs of uncertain official status use them to kill innocent victims and where national law enforcement is essentially ineffective. Who has jurisdiction to investigate this network and execute arrests and prosecutions? If the trafficker is now in Country H, to which country should Country H be legally obligated to extradite the trafficker? The prohibitions of the ATT focus predominantly on requiring Country A to not authorize transfer of the arms, and Countries A and B should regulate the trafficker as a broker. But the important question remains how to arrest and prosecute traffickers, and to do that requires establishment of criminal jurisdiction.

Consider that, in addition to killing citizens of Country F, the arms are used to kill citizens of Country G who were in Country F, perhaps as guests or perhaps executing bi- or multilateral law enforcement functions (e.g. fighting illicit drug or human trafficking). Of these countries, Country G has a legal interest (justice for its citizens-victims) in breaking up this criminal enterprise and prosecuting the trafficker. If Country G has criminalized diversion of weapons to groups or entities who use them to kill its citizens, then it could assert passive personality jurisdiction and, if circumstances warrant, protection of vital national interests.<sup>123</sup> Country G could seek the trafficker's

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123. For example, Viktor Bout was prosecuted in the United States under, *inter alia*, 18 U.S.C. § 1114 (2012) (providing protection to Officers and Employees of the United States), because he sold firearms with knowledge that the buyer's purpose was to use them against persons working for the US government. *United States v. Bout*, 731 F.3d 233 (2d Cir. 2013) (affirming conviction). Other federal criminal statutes that small arms smugglers have been prosecuted under include § 2339A (providing material support or resources, including weapons, to those known to engage in or intending to engage in terrorism) and § 2339B (providing material support or resources, including weapons, to nationally designated foreign terrorist organizations).

extradition from Country H and could solicit evidence from all the mentioned countries to establish the trafficker's criminal responsibility.

This scenario greatly simplifies the prosecutions in US courts of conventional arms brokers such as Viktor Bout<sup>124</sup> and Monzer Al Kassar.<sup>125</sup> These prosecutions have depended on increasingly effective principles of legal assistance and cooperation.<sup>126</sup> Despite the success of these prosecutions, experts assert that substantial barriers to the effective investigation and prosecution of criminal diverters of conventional arms remain.<sup>127</sup>

The ATT makes only two modest contributions to addressing these barriers. Article 11.4 prescribes that when a State Party detects a diversion of transferred conventional arms, it shall take "appropriate measures, pursuant to its national laws" to address that diversion. "Such measures may include alerting potentially affected States Parties, examining diverted shipments . . . and taking follow-up measures through investigation and law enforcement." In terms of the above-described situation, Countries C, D, and E may be obligated, if any of them detect diverted conventional arms, to alert other States or to engage law enforcement.

124. *Bout*, 731 F.3d at 233.

125. *United States v. Al Kassar*, 660 F.3d 108 (2d Cir. 2011).

126. *See* *United States v. Naidu*, 465 Fed. App'x. 264, 266 (4th Cir. 2012) (convicting Naidu for conspiracy to provide material support, including illicit firearms for terrorist organizations); *United States v. Aguilera-Urbay*, 480 Fed. App'x. 564, 574 (11th Cir. 2012) (convicting Urbay, a Cuban national, and his co-conspirator Abdal Aziz Hamayel of conspiracy to receive and possess stolen firearms); *see also* Colby Goodman & Scott Stedjan, *Beyond Viktor Bout: Why the United States Needs an Arms Trade Treaty* (Oxfam Briefing Paper No. 156, Oct. 6, 2011) ("The US has worked on at least 70 US prosecutions in the last five years that have charged defendants with crimes related to illegal arms brokering."); U.S. DEP'T OF JUSTICE, FACT SHEET: MAJOR U.S. EXPORT ENFORCEMENT PROSECUTIONS DURING THE PAST TWO YEARS (Oct. 20, 2008), available at <http://www.justice.gov/opa/pr/2008/October/08-nsd-959.html> (listing fifteen successful prosecutions against illicit trafficking in firearms, munitions and related articles from 10/06—10/08).

127. For a fuller discussion of the current limitations of international criminal law enforcement in this domain, see CUKIER, *supra* note 103; James G. Stewart, *Atrocity, Commerce and Accountability*, 8 J. INT'L CRIMINAL JUSTICE 314 (2010); Katharine Orlovsky, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343 (2006); SARAH PARKER, IMPROVING THE EFFECTIVENESS OF THE PROGRAMME OF ACTION ON SMALL ARMS, IMPLEMENTATION CHALLENGES AND OPPORTUNITIES (2011).

It is important to briefly mention what is not required by Article 11.4. There is no obligation whatsoever to detect diverted arms or even to strengthen detection capabilities. There is no obligation to check transited or trans-shipped arms against national or international records to find out if they have been diverted. The premise of Article 11.4 is the odd chance of coming across diverted arms. Once those arms are detected, there is no obligation to trace them to their source or to where they might have been diverted from or by whom. There is not an obligation to destroy the arms or even to stop them from reaching a criminal recipient.

As discussed below, each State Party must maintain national records of its exported conventional arms and should maintain records of transited or trans-shipped arms, yet there is no Article 11 requirement that States which have detected diverted conventional arms check them against the records of other States Parties. There is no obligation whatsoever to engage Interpol or other transnational law enforcement organizations, although a State is certainly welcome to do so (and may be bound to do so by other commitments). Article 11 contains no obligation to inform the ATT Secretariat of the detected diverted arms.

The second ATT provision that is relevant to stopping criminal arms transfers is Article 15.4, which encourages States to share “information regarding illicit activities and actors and [sic] in order to prevent and eradicate diversion of conventional arms.” More directly, Article 15.5 requires States to afford one another the “widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.”<sup>128</sup> While Article 15’s sweepingly general provisions could justify virtually any positive action that a State chooses to undertake against diversion, there are no specific obligations to do much of anything. Most important, the ATT omits a *prosecute or extradite* obligation, and it does not obligate sharing of records or other types of evidence. The broad language of Article 15 is, at best, a marker for yet-to-be-negotiated international legal assistance obligations that can tackle the illicit arms trade more rigorously.

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128. ATT, *supra* note 1, art. 15.4–5.



Worth noting in this context are the ATT draft provisions for strengthening enforcement that were removed from the final text. States would have been required to:

- Adopt measures to provide for the investigation and prosecution of those violating the Treaty;
- Take all necessary measures to prevent, counter, and prosecute corruption, as well as money laundering, by those within its territories or by its nationals;
- Adopt legislation or other appropriate measures to ensure the ability to enforce the obligations of the treaty and to prohibit the transfer of arms from any location under that State's jurisdiction and control unless authorized in accordance with the Treaty;<sup>129</sup> and
- Require an end-use certificate that provides assurance of the end-user's use of the arms issued by competent national authorities and bearing a unique serial number so that authenticity of the certificate is easily checked.<sup>130</sup>

The principal objection to these provisions, led by the United States, was that the ATT should not spell out all the details of national implementation which should be left to each State. "[T]he Conference must be unequivocal in making enforcement of the Treaty's provisions a national, rather than international or multilateral, responsibility of each State Party."<sup>131</sup> As a consequence, the ATT's contributions to stopping arms criminals are modest at best. States that currently have weak and ineffective measures are under no obligation to improve their current system. This represents a large loophole as States have no obligation to criminalize or punish violations of the Treaty if their current system has no laws or regulations pertaining to the obligations of the Treaty.

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129. Chairman's Draft Paper 2011, *supra* note 42, art. 6(C). Most references to the enforcement section in the Chairman's Paper are actually in support of the detailed enforcement mechanisms/requirements. In particular, the United Kingdom, Costa Rica, and Kenya were strong advocates of including enforcement requirements.

130. *National Implementation of the proposed Arms Trade Treaty: A Practical Guide*, OXFAM (2010), [http://www.oxfam.org/sites/www.oxfam.org/files/English\\_PATT\\_full\\_web.pdf](http://www.oxfam.org/sites/www.oxfam.org/files/English_PATT_full_web.pdf).

131. *ATT Thematic Statement*, UN FIRST COMM. (2011), <http://www.state.gov/documents/organization/194103.pdf>

The key question, looking forward, is whether there continue to be active arms criminals who escape prosecution. If so, then it may be worth considering a more mandated set of legal obligations with regard to legal assistance and cooperation in this context.

#### IV. *CONVENTIONAL ARMS TRANSFER CONTROL SYSTEM*

The least substantial aspect of the ATT is its contribution to developing national systems for controlling who has transferred conventional arms or may do so. Indeed, the ATT evinces a commitment to not intrude into sensitive matters concerning domestic control of conventional arms and how the international community should monitor nations' control systems. In terms of mandating official responsibilities to control arms, at either the national or the international level, the ATT falls far short of other arms control treaties such as the Nuclear Nonproliferation Treaty or the Chemical Weapons Convention.

##### *A. National Control Systems*

Little detail is given to the Article 5.2 requirement that States establish a "national control system, including a national control list." This requirement offers no metrics such that it might be possible to say that a particular State's control system satisfies an international standard. These are broad terms of art, establishing a requirement that each State undertake a self-assessment of what its national authorities currently regulate, whether for export or domestic transfer, and how its regulatory system operates. The objective here is to clarify who are the officials obligated to carry out the treaty's provisions. With this clarification, the international community can better appreciate national authorities' capacities, and all complying States can gain confidence of a mutual commitment to comply with the treaty.

Many nations advocated that there is no one-size-fits-all approach to national control systems. Countries vary greatly with regard to the amount of arms transfers that occur under their jurisdiction; some may need expansive systems while others may only need a minimal system. Moreover, there is the vast discrepancy in national wealth and thus ability to implement

comprehensive systems. Notably, the final Treaty does include the suggestion that States implement an import control system to regulate imports of conventional arms into their jurisdiction.<sup>132</sup> Yet, States have unfettered discretion to implement a system of their choice, even a system that is entirely superficial.

These factors have led to the final text with its open-ended description of national control systems as this allows States to tailor their systems to their needs.<sup>133</sup> Article 5.3 encourages States to apply treaty provisions broadly, referring at minimum to descriptions of weapons categories used in the UN Register of Conventional Arms. Yet, provisions that would have required regulatory oversight over conventional arms leases,<sup>134</sup> loans,<sup>135</sup> and gifts<sup>136</sup> were removed from the final text. This allows for unregulated leases with upfront expensive payments to be enacted as an alternative to sale. It would be exceedingly difficult to determine whether the lessor actually expects the arms returned and therefore it would be just as difficult to determine whether this type of transaction is a lease or merely a sale labeled a lease. Similarly removed was any oversight of arms research and development<sup>137</sup> and to raising or providing funds to enable a transfer of conventional arms.<sup>138</sup>

Article 5.5 and 5.6 requires establishment of “competent national authorities” and national points of contact that provide an official and easy-to-access route for all national authorities to give and receive information. Officials responsible for carrying out various implementation activities of the treaty must ensure that information is accurately exchanged through methods designed by Interpol and other organizations. The ATT Secretariat will maintain and make available the list of national points of contact and will facilitate matching offers and requests for assistance and international cooperation. Building

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132. ATT, *supra* note 1, art. 8.

133. See *Compilation of Views*, *supra* note 46.

134. Chair of the Preparatory Committee of the Conference on the Arms Trade Treaty, Chairman’s Draft Proposal, Annex B(k) (Feb. 16, 2011) (by Roberto García Moritán).

135. *Id.* annex B(l).

136. *Id.* annex B(m).

137. *Id.* annex B(o).

138. *Id.* annex B(p).

confidence and cooperation among States in this way serves to strengthen law enforcement capacities to tackle illicit arms trafficking.

All this to the ATT's credit, yet a moment's consideration should be given to what was omitted from the final text. Earlier drafts specified responsibilities for national coordination agencies, including policy guidance, coordination of law enforcement and other authorities, research and monitoring of efforts to stanch illicit transfers, and identification of criminal networks. Mandating such responsibilities would encourage dedication of resources to fulfilling the aims of the Treaty. The varying needs of different States, however, led to the omission of these requirements. Other measures would have ensured that each State has a sufficient number of properly trained staff to ensure that the measures required by the Treaty are implemented successfully. Some States argued that the Treaty should have included aid arrangements that would enable less developed States to receive assistance for training their officials. The ATT leaves all these matters for future consideration.

#### B. *Recordkeeping and Information Sharing*

Promoting information recording and sharing is one of the ATT's most essential objectives. Accordingly, national authorities should maintain records of export authorizations that include details of types of weapons being shipped, their destination, method of shipment, and, in some cases, why are they being shipped. Such information can also include the containment methods for the weapons and the security standards.<sup>139</sup> Each State Party is encouraged to maintain comparable information on arms transferred to its territory for import, transit, or trans-shipment.

This information, together with records urged by the Firearms Protocol about the weapons' manufacturers,<sup>140</sup> assists in providing transparency of weapons shipments and can help in

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139. See Safeworld, *An Implementation Framework for the Arms Trade Treaty* (July 2011), <http://controlarms.org/wordpress/wp-content/uploads/2011/07/An-Implementation-Framework-for-the-ATT.pdf>; Oxfam, *National Implementation of the Proposed Arms Trade Treaty: A Practical Guide* (July 14, 2010), [http://www.oxfam.org/sites/www.oxfam.org/files/English\\_PATT\\_full\\_web.pdf](http://www.oxfam.org/sites/www.oxfam.org/files/English_PATT_full_web.pdf).

140. Firearms Protocol, *supra* note 17, art. 15.

tracing such weapons if they have been diverted. Dates and details of weapons types can also help identify where weapons diversions occur. For example, if a participant in transnational organized crime is known to use certain types of weapons, sharing such information can help identify weapons trafficking routes to ultimately clarify how criminals are acquiring weapons.

Article 13 requires each State Party to report to the Secretariat on measures undertaken to implement the treaty; these Reports will be distributed to all States Parties. Each State Party must also submit annual reports concerning authorized or actual conventional arms exports and imports. Reports “may contain the same information submitted by the State Party to relevant UN frameworks, including the UN Register of Conventional Arms. Reports may exclude commercially sensitive or national security information.”<sup>141</sup>

### CONCLUSION

The ATT is a political compromise—the common denominator of global opinion about how to stanch the illicit arms trade. Advocates must be simultaneously disappointed by concessions left behind and exhilarated by opportunities to stanch the previously anarchic circulation of humanity’s most lethal weapons. “[T]his Treaty sets a floor—not a ceiling . . . .”<sup>142</sup> No one can reasonably believe that the world’s raging violence will sputter and subside merely because of the UN General Assembly’s approval of treaty text. If that were true, war would have ended in 1928 when the League of Nations approved the Kellogg-Briand Pact.

What may be said with confidence is that the ATT builds upon a foundation of hard treaties, soft international guidelines, and webs of inter-operative commitments that are enhancing law’s incremental victory over weaponized violence. Its success depends on the assiduous work of the United Nations, a host of international and regional organizations and NGOs to establish,

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141. ATT, *supra* note 1, art. 13.3

142. See Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, Statement to the United Nations at the UN General Assembly Meeting on the Arms Trade Treaty (Apr. 2, 2013), *available at* <http://usun.state.gov/briefing/statements/207006.htm>.

under the ATT's imprimatur, legal capacities for ensuring that only peaceful and lawfully authorized people have conventional arms. The Secretariat should act as a catalyst for making the ATT effective, but whether the Secretariat emerges as a hub of information that can stanch the illicit weapons trade or is merely a distributor of unread reports remains to be seen. As mentioned earlier, much of the ATT's success depends on how rigorously the Secretariat enables gathering and sharing of information that helps disable criminal arms traffickers.

The ATT's impact depends, ultimately, on whether its obligations are implemented in harmony with many other policies for reducing conflict. If the quantity and voracity of violence involving conventional arms declines, then the abstract legal questions about the ATT's terms and requirements can be left for scholars. To control conventional weapons will require more work and more legal measures, but the ATT is an important contribution to international law's pursuit of the eradication of violence and preservation of peace.

